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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	
REEXAMINATION OF THE POLICY STATEMENT ON COMPARATIVE BROADCAST HEARINGS	GC Docket No. 92-52 RM-7739 RM-7740 RM-7741

To: The Commission

Joint Comments Of
John A. Carollo, Jr., Friendship Communications, Ltd., JAM FM Limited Partnership, Chanel Broadcasting, Palm Tree FM Limited Partnership, Craig L. Siebert, WEDA, Ltd., Columbia FM Limited Partnership, and O'Day Broadcasting, Ltd.

John A. Carollo, Jr., Friendship Communications, Ltd., JAM FM Limited Partnership, Chanel Broadcasting, Palm Tree FM Limited Partnership, Craig L. Siebert, WEDA, Ltd., Columbia FM Limited Partnership, and O'Day Broadcasting, Ltd. (collectively the "FM Applicants") pursuant to Section 1.415(a) of the Commission's Rules, 47 C.F.R. § 1.415(a), hereby submit their Comments in response to the Commission's Second Further Notice of Proposed Rulemaking in GC Docket No. 92-52, 9 FCC Rcd ____ (FCC 94-167, released June 22, 1994) (hereinafter the "Second Notice").[1/]

Interest Of The FM Applicants

1. The FM Applicants are all pending applicants for construction permits for new FM stations. All the FM Applicants are parties to hearing proceedings before the Commission or the

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[1/] The FM Applicants' Comments are timely filed. *See*, Second Notice, *supra*, at p. 2, ¶ 14.

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U.S. Court of Appeals.[2/] All the FM applicants claimed comparative superiority based upon the Commission's comparative criteria in effect when they filed their applications, including the integration preference. In the case of several of the FM Applicants (Carollo and Friendship), the Commission had deemed them comparatively superior to other applicants. *See*, Lucinda Felicia Paulos, 8 FCC Rcd 8237 (Rev. Bd. 1993) (Carollo comparatively superior applicant on basis of local residence); Edwin A. Bernstein, 8 FCC Rcd 8016 (Rev. Bd. 1993) (Friendship the comparatively superior applicant on basis of past local residence). Thus, all the FM Applicants will be affected by any new comparative selection procedures upon which the Commission decides.

Retroactive Application Of New Criteria Without Amendment Would Be Arbitrary and Capricious And Not Withstand Judicial Review.

2. The Second Notice asks that comments consider:

> under what circumstances it would be appropriate to permit applicants in pending cases to amend their proposals in light of newly-adopted standards and when further evidentiary proceedings would be warranted.

Id., at ¶ 8. The FM Applicants submit that in *all* pending cases, applicants must be allowed to amend their proposals. The FM Applicants firmly oppose the retroactive application of any new comparative criteria without the opportunity to amend their

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[2/] John A. Carollo (MM Docket No. 90-298); Friendship Communications, Ltd. (MM Docket No. 88-584); JAM FM Limited Partnership (MM Docket No. 89-543); Chanel Broadcasting (MM Docket No. 90-218; Case No. 93-1709 before U.S. Court of Appeals); Craig L. Siebert (MM Docket No. 90-323) WEDA, Ltd. (MM Docket No. 90-638); Columbia FM Limited Partnership (MM Docket No. 90-418); O'Day Broadcasting, Ltd. (MM Docket No. 91-100).

applications and take whatever evidence is necessary in light of such evidence.

3. Retroactivity in notice and comment rulemaking proceedings is inherently suspect. Bowen v. Georgetown University Hospital, 488 U.S. 203 (1988). *See also*, Health Insurance Association of America, Inc. v. Donna E. Shalala, No. 92-5196 (May 13, 1994). Nothing in either the Communications Act or the Administrative Procedure Act would support a retroactive application of any new criteria for selection among broadcast applicants, without the ability of pending applicants to amend to meet those criteria. Such specific statutory authority would be required for there to be a retroactive application of new selection criteria.[3/] As the Supreme Court noted in Bowen:

[3/] In Maxcell Telecom Plus, Inc. v. F.C.C., 815 F.2d 1551 (D.C. Cir. 1987), which was decided before Bowen, the D.C. Circuit was able to discern sufficient Congressional intent in the adoption of the lottery statute, 47 U.S.C. § 309(i), to justify retroactive imposition of the lottery procedures for selection of cellular telephone applicants that had originally been filed in anticipation of comparative hearings. 815 F.2d at 1555. This is a limited exception because of the specific Congressional intent to employ lottery procedures to eliminate application backlogs, *inter alia*. Id. Moreover, there was no imposition of any obligation or liability nor the deprivation of any rights as a result of the change from comparative hearing to lottery selection procedures. Further, the applicants in cellular markets 31-90 upon whom the Commission imposed lottery procedures retroactively had not been set for hearing.

By contrast, especially in the case of parties such as the FM Applicants that have incurred substantial obligations in reliance upon the Commission's existing procedures and have been involved in multi-party proceedings for as much as 7 years (Friendship and JAM FM filed their applications in 1984), a retroactive obligation without the opportunity to amend to meet the new criteria could effectively destroy the financial investment by the applicants in

(continued...)

> It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.

Id., at 208. There is no specific authority, either in Section 303(r) of the Act, 47 U.S.C. § 303(r), governing rulemaking powers, nor in the broadcast licensing provisions, Sections 307-309, 47 U.S.C. §§ 307-309, to justify the retroactive imposition of new comparative selection procedures.

4. Further, such retroactive application of rules is specifically prohibited by the Administrative Procedure Act. The APA specifically defines a "rule" as an agency statement "of general or particular applicability *and future effect*." 5 U.S.C. § 551(4) (emphasis supplied). *See also* Bowen, supra, 488 U.S. at 218 (J. Scalia Concurring). Although the Commission previously adopted its comparative hearing procedures as a statement of Commission policy rather than as the product of notice and comment rulemaking, *see*, Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965), the Commission has specifically chosen the procedure of notice and comment rulemaking for the revised hearing procedures.[4/] Consequently, it must provide

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[3/](...continued)
prosecution of their cases in reliance upon the comparative criteria in effect when they filed their applications.

[4/] As the D.C. Circuit has noted in Bechtel v. F.C.C., 10 F.3d 875, 878 (D.C. Cir. 1993), policy statements are exempt from the APA's notice and comment requirements, 5 U.S.C. § 553(b), "and hence may take effect without the rigors -- and presumed advantages -- of that process."

applicants the opportunity to amend to meet those new standards if they are to be applied retroactively.

5. Retroactive application of any new hearing procedures without the opportunity to amend and take new evidence after the rule is adopted would amount to what Justice Scalia characterized as "secondary retroactivity", *i.e.*, "altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule..." Id., 488 U.S. at 220 (J. Scalia Concurring). In this case, retroactive application of new hearing procedures without the opportunity to amend to meet any new standards would still impose retroactively a substantial regulatory burden, with attendant financial costs, upon parties who had made financial decisions in reliance upon rules and policies then in effect. Such retroactivity is prohibited by the APA.

The Commission Should Continue To Emphasize Local Ownership In Comparative Licensing Decisions.

6. The 1965 Policy Statement stressed the importance in licensing decisions of local ownership as a factor that would serve the public interest. Ownership by a local resident was deemed to "indicate[] a likelihood of continuing knowledge of changing local interests and needs." Id., 1 FCC 2d at 396. The Commission deemed involvement in civic activities as "an aspect of an applicant's familiarity with the community of license and should be considered with local residence as a comparative factor to determine which applicant has the greater likelihood of knowledge of and interest

in the community." Ronald Sorenson, 6 FCC Rcd 1952, 1953 (¶ 5) (1991), *recon. dis.*, 6 FCC Rcd 6901 (1991).

7. Local ownership was previously considered only with reference to those owners proposing to integrate into the new station. 1965 Policy Statement, *supra*, 1 FCC 2d at 396, n. 7. However, when it invalidated the integration analysis, the Bechtel court did not extend its opprobrium of quantitative integration to such "qualitative" enhancements as local ownership. *See generally*, Bechtel v. F.C.C., *supra*, 10 F.3d at 882. It appeared to accept that local ownership *per se* could improve awareness of community needs. ("Familiarity with a community seems much more likely than station visitors or correspondence to make one aware of community needs." Id., at 885).

8. Any new licensing criteria should continue to credit local ownership.

9. The Commission's licensing scheme is premised in large part upon localism and service to the community of license. Several examples exist of this emphasis on the local community.

10. For example, Section 307(b) of the Communications Act compels the Commission to consider the allocation of radio stations "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. §307(b).

11. The Commission expects that its licensees will serve the interests of their respective communities. Licensees are required to maintain in their public inspection files lists of programs

broadcast by the licensee to address certain community issues and concerns. 47 C.F.R. § 73.3526(a)(8)(i) and (9). This rule is intended to document that licensees have broadcast programming responsive to community needs during license terms. Office of Communications of United Church of Christ v. F.C.C., 779 F.2d 702 (D.C. Cir. 1985), *remand*, 104 FCC 2d 505 (1986). The Commission will examine whether the licensee has broadcast such programming in determining whether a licensee merits renewal of its license. *See generally*, Radio Station WABZ, Inc., 90 FCC 2d 818 (1982), *aff'd sub nom.* Victor Broadcasting, Inc. v. F.C.C., 722 F.2d 756 (D.C. Cir. 1983).

12. In these and other respects, the public interests of the local community of license are at the core of the Commission's licensing decisions. It can be inferred that local owners, who live or have previously lived in the community of license, and would be most affected by such problems and solutions to those problems, by virtue of being immediately available in the community of license, are more sensitive to and aware of the problems, needs and interests of their communities than absentee owners.

13. The FM Applicants submit that such knowledge of community issues intuitively flows from past or present residence in the community of license and involvement in community affairs. For example, local principals are aware of the impacts of crime from their residence in the community. They are aware of the problems of schools which their children attend. They are aware of the need for changes in local business regulations from the impact of the

local regulatory environment on their other businesses and those of their friends. They presumably can listen to the program broadcast to meet those needs and issues.

14. The Commission should credit local ownership, past or present, *per se* as an enhancement in any future licensing structure. Given the emphasis upon licensees' being responsive to community needs, local residents will have a better understanding of those problems, needs and interests.

Conclusion

15. The procedural issue is plain. The Commission should not adopt any new criteria for selection of broadcast applicants without providing all applicants in pending proceedings the opportunity to amend their applications. To do otherwise would impose a prohibited retroactive burden on the FM Applicants and all similarly situated parties.

16. Further, in revising its criteria, the Commission should continue to factor the amount of local ownership into its licensing decisions.

Respectfully submitted,

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Dated: July 22, 1994
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CERTIFICATE OF SERVICE

I, Lisa Y. Taylor, a secretary in the law firm of Besozzi, Gavin & Craven do hereby certify that a copy of the foregoing **"JOINT COMMENTS"** has been hand delivered this 22nd day of July, 1994 to:

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